National Aeronautics and
Space Administration

Principal Center for Regulatory Risk Analysis and Communication

REGULATORY SUMMARY

Final Rule
Revisions to the General Conformity Regulations

This information was prepared by NASA's Principal Center for Regulatory Risk Analysis and Communication (RRAC PC). If you have further questions or need assistance with this matter, please contact the RRAC PC Manager, Sharon Scroggins (256-544-7932, sharon.scroggins@nasa.gov).

Executive Summary

On 5 April 2010, the U.S. Environmental Protection Agency (EPA) published in the *Federal Register* (FR) the final rule (75 FR 17254) amending the General Conformity Regulations. These rules implement Clean Air Act (CAA) provisions requiring federal agencies to evaluate emissions from proposed actions that may cause or contribute to violations of the national ambient air quality standards (NAAQS). The revised rule is intended to improve the process federal entities use to demonstrate that their actions will not contribute to a NAAQS violation. It also provides tools to encourage better communication and air quality planning between states and federal agencies, and encourages both the federal agencies and the states to take early actions to ensure that projects will conform to state implementation plans (SIPs) to implement the NAAQS. To meet the General Conformity requirements, federal entities must demonstrate that emissions from their actions will not exceed the emission budgets established in a SIP to attain or maintain the NAAQS. The final rule will become effective 6 July 2010.

Applicability to NASA

The National Aeronautics and Space Administration (NASA) is required to comply with the General Conformity Regulations. NASA's proposed actions that will occur in nonattainment or maintenance areas must undergo conformity analyses to evaluate air emissions and to demonstrate that the anticipated emissions will not cause or contribute to NAAQS violations. With respect to the National Environmental Policy Act (NEPA), which requires federal agencies to evaluate the potential environmental impacts of proposed actions, the conformity determination process must be conducted for the proposed action or alternative once the NEPA review has been finalized.

Background

EPA promulgated the first General Conformity Regulations under Section 176(c) of the CAA in 1993 to prohibit federal agencies from taking actions that may cause or contribute to violations of NAAQS in an area working to attain or maintain NAAQS. The regulations had not been revised substantially until the 24 March 2010 final rule was issued.

The General Conformity Rule divides the air conformity process into two distinct areas, applicability and determination, as discussed in the following sections.

Similar to performing NEPA analyses, federal agencies must make their conformity determinations through a public process. The General Conformity Regulations require federal agencies to provide notice of the draft determination to the appropriate EPA Regional Office, the state and local air quality agencies, the local metropolitan planning organization (MPO) and, where applicable, the federal land manager(s) (FLMs). In addition, federal agencies must provide at least a 30-day comment period on the draft determination and make the final determination public. State agencies and the public may appeal the final conformity determination in the United States (U.S.) Courts system.

Applicability

In this rulemaking, EPA has added the new term, applicability analysis, to describe the process of determining if a federal agency must conduct a conformity determination for its planned action. In the applicability process, a federal agency must determine the following:

- Whether the action will occur in a nonattainment or maintenance area (only actions that cause emissions in designated nonattainment and maintenance areas are subject to the regulations)
- Whether one or more of the specific exemptions apply to the action
- Whether the federal agency has included the action on its list of "presumed to conform" actions
- Whether the total direct and indirect emissions are below or above the *de minimis* levels
- Whether the emissions from the proposed action are within the budget, in cases where the facility has an approved emission budget in the SIP

If the action will cause emissions above the *de minimis* level in any nonattainment or maintenance area and the action is not otherwise exempt, "presumed to conform," or included in the existing emissions budget of the SIP, the agency must conduct a conformity determination before it initiates the action.

Conformity Determinations

Federal agencies must show that the proposed action will meet all SIP control requirements and the emissions from the action will not cause a new violation of the NAAQS, or interfere with the timely attainment of the NAAQS, maintenance of the NAAQS, or the area's ability to achieve an interim emission reduction milestone.

April 2010 Amendments

The 5 April 2010 final rule (75 FR 17254) includes the following amendments:

- Requirements allowing federal facilities expecting future expansion or modifications to negotiate a facilitywide emission budget with state air quality agencies. Actions that do not exceed these budgets would already conform to the SIP and would not need an additional conformity determination.
- Early emission reduction credit program for all agencies that follow the Airport Early Emission Reduction guidance developed jointly by EPA and the Federal Aviation Administration. This program encourages emission reduction actions by federal agencies by providing emission reduction credits that can be used to demonstrate conformity for subsequent actions.

- Emission offsets of one precursor pollutant by the reduction of emissions of another precursor pollutant. For example, oxides of nitrogen (NOx) and volatile organic compounds (VOCs) are ozone precursors. In an area that does not meet EPA's ground-level ozone standard, reductions in NOx emissions could be offset by reductions of VOCs.
- Alternative schedules for mitigating emission increases where state air quality agencies might accommodate temporary emission increases in exchange for long-term or permanent emission reductions.
- Lists of actions that federal agencies can presume to conform. The final rule also allows a state to establish "presumed to conform" lists for actions in that state.

Additionally, the final rule removes requirements for federal agencies to conduct conformity determinations for "regionally significant" actions. Such actions have emissions greater than 10 percent of the emissions inventory for a nonattainment area. Over time, these analyses have been conducted and have never shown an action to interfere with the attainment or maintenance of NAAQS.

Substantive changes to the regulations are discussed in detail in the following sections.

Actions across Multiple Areas

The emissions from most federal actions or projects occur within one nonattainment or maintenance area. However, some actions or projects could extend across area boundaries, causing emissions in more than one nonattainment or maintenance area. In the final rule, EPA has indicated that conformity analyses of such actions should be handled as if they result from separate actions because:

- Federal agencies demonstrate conformity to a SIP or a Federal Implementation Plan (FIP) developed on an area-specific basis, and SIP requirements may vary from one area to another.
- The General Conformity Regulations' exemptions are area-specific. For example, the *de minimis* levels are based on the type and classification of the nonattainment or maintenance area.
- Section 176(c)(5) of the CAA limits the applicability of the conformity regulations to actions in nonattainment and maintenance areas. Therefore, actions that affect broad regions encompassing several nonattainment, maintenance, or attainment areas must be evaluated based only on the portions of the emissions in the nonattainment and maintenance areas.

Applicability Analysis

In the original General Conformity Regulations, EPA included a list of actions that were "presumed to conform." The regulations also allow federal agencies to establish their own lists of actions that are "presumed to conform" with applicable SIPs. Federal agencies must justify the inclusion of the actions on their "presumed to conform" list by demonstrating either:

- That the actions will not cause or contribute to an air quality problem or otherwise interfere with the SIP or FIP, or
- That the actions will have emissions below the *de minimis* levels

Federal agencies must provide copies of the proposed list to EPA, affected state and local air quality agencies, and MPOs. In addition, the agencies must provide at least a 30-day public

comment period and document the responses to all comments. The notice of the proposed and final list must be published in the FR.

In the final rule, EPA has amended the sections on applicability analyses to provide federal agencies with guidance in developing their lists of actions that are "presumed to conform" and to provide requirements for the materials that must be included in the documentation and draft list. EPA has specified the following:

- When and how more than one "presumed to conform" exception may be taken for a federal action
- That federal agencies may list actions for individual facilities, areas, or SIPs (rather than actions being nationally applicable)
- What information must be included in the supporting documentation
- That federal agencies must notify EPA when the "presumed to conform" actions would have multi-regional or national impacts

Regionally Significant

EPA has deleted the "regionally significant" test required under paragraph 40 *Code of Federal Regulations* (CFR) 93.153(i). The General Conformity Regulations define "regionally significant" as "a federal action for which the direct and indirect emissions of any pollutant represent 10 percent or more of a nonattainment or maintenance area's emissions inventory." 40 CFR 93.153(i) and (j) formerly required conformity determinations for all regionally significant actions, regardless of any exemptions or presumptions of conformity. EPA believes that the determination of whether actions with emissions below the *de minimis* emission levels are regionally significant has been a burden to some federal agencies, with little or no environmental benefit.

Conformity Evaluations for Installations with Facilitywide Emission Budget

EPA has added a new section (40 CFR 93.161) to the regulations to allow the use of a facilitywide emission budget in evaluating conformity to allow agencies to demonstrate that their emissions are in conformance with the SIP . Use of a facilitywide emissions budget would preemptively allows states and federal agencies to identify acceptable levels of emissions from the facility for inclusion in the SIP. EPA believes that this provision would streamline the environmental review of the action and conformity process, provided that the facility remains within the facilitywide emission budget agreed upon with the regulatory agency. The development and use of a facilitywide emission budget would be voluntary on the part of the federal, state, and local air quality agencies.

Emissions beyond the Time Period Covered by the Applicable SIP

EPA has added a new section to allow federal agencies to demonstrate conformity using the last emission budget in the SIP. If it is not practicable to demonstrate conformity using that method, then the federal agency may request that the state provide an enforceable commitment to include the emissions from the federal action in a current or future SIP emissions budget. In such a case, the state would be required to submit a SIP revision within 18 months either to include the emissions in the current SIP or to include a commitment to account for the emissions in future SIPs. The emissions included in the future SIP should be based on the latest planning assumptions at the time of the SIP revision.

Timing of Offsets and Mitigation Measures

Mitigation measures and offsets are used to reduce the impact of emission increases from a project or action. The emissions reductions from offsets or mitigation measures should occur at the same time as the emission increases from the project. In general, EPA has interpreted this to mean that the reductions must occur in the same calendar year as the emission increases caused by the action because the total direct and indirect emissions from an action are collated on an annual basis. EPA has clarified this in the final rule amendments. As an alternative, under special conditions and consistent with CAA requirements, the state may approve other schedules for offsets or mitigation measures. Emissions reductions used over an alternate schedule must be consistent with statutory requirements that new violations are not created, the frequency or severity of existing violations are not increased, and timely attainment or interim milestones are not delayed. The final rule also requires that the offset or mitigation ratios for alternative schedules be greater than one-for-one, a ratio that is no less than the applicable NSR offset ratios for the area.

The final rule also requires that the mitigation or offset compensation period should not exceed double the timeframe. For example, a federal agency might be supporting a construction project lasting 3 years in a serious nonattainment area and that project will cause 150 tons per year of increased emissions; the state can approve mitigation measures or offsets that reduce emissions by less than 150 tons per year, provided the total reduction over a 6-year period is equal to or more than 540 tons (150 tons per year times 3 years equals 450 tons times the offset/mitigation ratio of 1.2 to 1 for serious nonattainment areas equals 540 tons).

Inter-Precursor Offsets and Mitigation Measures

EPA has added new amendments to allow the use of inter-precursor offset and mitigation measures where they are allowed by the SIP. For example, some states and local air districts have SIP-approved New Source Review (NSR) regulations that allow new or modified stationary sources to offset the increase in emissions of one criteria pollutant precursor by reducing the emissions of another precursor of the same criteria pollutant, provided that there is an environmental benefit to such an exchange and an appropriate ratio of precursor reductions has been established.

EPA believes that allowing inter-precursor offsets will allow facilities flexibility in meeting the General Conformity requirements. Inter-precursor emissions may be traded only if two conditions are met:

- The state must already allow for inter-precursor offsets or trading through a SIP-approved NSR program, transportation conformity program, or in the attainment or reasonable further progress (RFP) demonstration to ensure conformance with a SIP.
- The trade must be technically justified and have demonstrated environmental benefits. This technical justification and demonstration should be accomplished by showing that the precursors are area specific and that appropriate ratios are identified in the SIP.

Early Emission Reduction Credit Program

EPA has added a new early emission reduction credit program for federal agencies subject to the General Conformity Regulations. The existing regulations require that offsets and mitigation measures be in place before the emissions increases caused by the federal action occur. However, emission reduction programs undertaken before the conformity determination

is made could be considered as part of the baseline emissions and not available as offsets or mitigation measures for future actions subject to the General Conformity requirements.

Under the new program, federal agencies could identify emission control measures and present the proposed reduction to the state or local air quality agency. If the action meets the following criteria for an offset, the state or local agency can approve the measure as eligible to produce emission reduction credits. The action must be:

- Quantifiable
- Consistent with the applicable SIP attainment and RFP demonstrations
- Surplus to the reductions required by and credited to other applicable SIP provisions
- Enforceable at both the state and federal levels
- Permanent within the timeframe specified by the program

If credits are issued, then a federal agency will be allowed to use the credits to reduce the total of direct and indirect emissions from a future proposed action. Credits must be used in the same calendar year in which they are generated.

Other Changes

EPA has included the following additional changes in the final rule.

Timing

- Mandated that the grace period before new motor vehicle emissions factors models are used in General Conformity determinations is 3 months from EPA's model release, unless a longer grace period is announced in the FR. This timeframe is consistent with 40 CFR 93.111, under the Transportation Conformity Rule that allows grace periods for new motor vehicle emissions factor models to be between 3 and 24 months.
- Mandated that a conformity analysis is first required for the attainment year specified in the SIP. If the SIP does not specify an attainment demonstration year, then the analysis is conducted for the latest attainment year possible under the CAA.
- Revised 40 CFR 93.153(k) to incorporate the provisions of Section 176(c)(6) of the CAA by allowing a conformity grace period for newly designated nonattainment areas. That section establishes a 1-year grace period following the effective date of the final nonattainment designation for each new or revised NAAQS before the conformity requirements must be met in the area. If an agency takes or starts the federal action before the end of the grace period, it must comply with the applicable pre-designation conformity requirements. If an agency takes or starts the federal action after the end of the grace period, it must comply with the post-designation conformity requirements. EPA has defined "take or start the federal action" to mean that a federal agency takes an action when it signs a permit, license, grant, or contract, or otherwise physically starts the federal action. If the agency fails to take or start the federal action during the grace period, then it must reevaluate conformity for the project based on the requirements for the new designation and classification.
- Revised the rule language to clarify that the date of a completed NEPA analysis, as evidenced by a signed finding of no significant impact (FONSI) for an environmental assessment, record of decision (ROD) for an environmental impact statement, or a record of a categorical exclusion, can be used when a conformity determination is not required.
- Clarified the requirements for needing to conduct a conformity determination when the action is modified. Because conformity determinations are only needed for emissions that

exceed the *de minimis* levels, EPA has clarified in the final rule that the federal agency does not have to revise its conformity determination unless the modification would result in an increase that equals or exceeded the *de minimis* emission levels for the area. For modifying an action that the federal agency determined had emissions below the *de minimis* level, EPA is requiring federal agencies to conduct a conformity determination for the modified action if the total emissions (the emissions from the unmodified action plus the increased emissions resulting from the modification) equal or exceed the *de minimis* levels for the area.

- Revised the General Conformity Regulations. Under the original General Conformity Regulations, federal agencies may demonstrate conformity by having the state commit to revising the SIP to include the emissions. If a state agrees to such a commitment, the state must submit a SIP revision within 18 months to include the emissions from the action and to make other necessary adjustments in the SIP to accommodate those emissions. However, the existing SIP (or a SIP required to be submitted in 18 months) may not cover the same timeframe covered by the conformity determination. For example, a SIP for a nonattainment area that demonstrates attainment may only cover the period until the attainment date, while the conformity determination may cover emissions for many years beyond that date. The state may be submitting future SIPs to address maintenance of the standard or a continuing nonattainment problem that would cover the time period of the emissions. EPA has amended the rule language to require states to submit a SIP revision if the existing SIP (or a SIP due within 18 months) does not cover the time period of the emissions. The revised SIP must include an enforceable commitment to account for the emissions in future SIP revisions.

Exemptions and "Presumed to Conform"

- Clarified the exemptions for aircraft emissions above the mixing height identified in the applicable SIP or FIP. Where the SIP does not contain a specific mixing height, EPA is establishing a default mixing height of 3,000 feet above ground level (AGL).
- Exempted emissions covered by an NSR permit for minor sources. The 1993 regulations exempt emissions covered by an NSR permit for major sources but not for minor sources. EPA concluded then that the purposes of the General Conformity review would be adequately met by the major source NSR review and that additional review would not be necessary. EPA now believes that minor source NSR provides similar review, and that this approach will reduce the duplicate review of emissions under both minor source NSR and conformity programs, and will treat all NSR-permitted emissions the same way.
- Conditionally extended the conformity analysis exemption. The General Conformity Regulations originally included a 6-month exemption from performing a conformity analysis for actions taken in response to an emergency. EPA, under certain conditions, will now extend the exemption from 6 to 12 months. To use the additional 6-month exemption, federal agencies must make a written determination that it is impractical to conduct an evaluation for the action. Under the final rule, if federal agencies need to extend the exemption past the initial 6-month period, EPA is requiring the federal agencies allow EPA and the state 15 days to review and provide comments on the draft written determination to extend the exemption. Federal agencies must then publish a notice in a daily general circulation newspaper for the affected area within 30 days of making the extension decision. EPA also is limiting federal agencies to three 6-month extensions without having to provide additional documentation.

- Included emissions from a prescribed fire conducted under an approved smoke management program as "presumed to conform." In the final rule, EPA has amended the regulations to allow federal agencies to presume that the emissions from prescribed burns will conform provided that the burning is conducted under a state-certified approved smoke management program or an equivalent replacement EPA policy.
- Added a provision in §93.153(i) to allow a state to adopt in its SIP a list of actions it "presumes to conform."

Emergencies

- Included wildfire response as an example of an emergency event that may be exempt from General Conformity requirements under 93.153 (d)(2) and (e) if it fits within the definition of emergency found in 40 CFR 93.152.

Notifications

- Provided federally recognized Indian tribal governments the same opportunity to comment on draft conformity determinations as that given to states, consistent with EPA's Tribal Authority Rule. Therefore, EPA is requiring federal agencies to notify federally recognized Indian tribal governments in the nonattainment or maintenance area.
- Added an alternative procedure for notifying EPA, via EPA's Office of Air Quality Planning and Standards rather than each regional office, when actions would result in emissions originating in nonattainment or maintenance areas in three or more EPA regions. A single contact point for EPA should be more efficient for the other federal agencies than notifying up to 10 regional offices.
- Provided an alternative public notification procedure for actions that cause emissions above the *de minimis* levels in three or more EPA regions. This change corrects a mistake made in the proposed rule preamble and an inconsistency with the proposed regulation, which stated that the alternative public notification procedure is for actions that have multi-regional or national impacts. The original General Conformity Regulations require that the federal agency publish a notice in a daily newspaper of general circulation in the nonattainment or maintenance area. However, some federal actions affect a large number of nonattainment and maintenance areas. To eliminate the burden of filing newspaper notices in multiple areas, EPA amended the rule language to allow the federal agencies to instead publish a notice in the FR if the action would cause emissions above the *de minimis* levels in three or more nonattainment or maintenance areas.

Confidential Information

- Added a new paragraph to 40 CFR 93.155 to describe how restricted information used to support conformity determinations should be handled when provided to EPA, states, and tribal governments. The interagency review and public participation provisions require federal agencies to make available for review the draft conformity determination with supporting materials. Certain unclassified information is privileged or otherwise protected from disclosure. EPA has revised the regulation to add language to protect restricted information in accordance with each federal agency's policy and regulations for the handling of restricted information. The amended regulations would allow state or EPA personnel with the appropriate clearances to view the restricted information.